No. 43

In the Supreme Court of the United States

OCTOBER TERM, 1959

WILLIAM R. FORMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

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INDEX

CITATIONS

527373—59——1

Cases—Continued

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OPINIONS BELOW

The Court of Appeals' initial opinion (R. 1923–1935) is reported at 259 F. 2d 128. The court's first supplemental opinion (R. 1936–1938) is reported at 261 F. 2d 181, and its second supplemental opinion (R. 1939–1940), at 264 F. 2d 955.

JURISDICTION

The first judgment of the Court of Appeals was entered on September 15, 1959. (R. 1923.) The judgment was modified on October 27, 1958, on a petition for rehearing which the Government had filed on October 15, 1958. (R. 1936.) Petitioner's petition for further rehearing was denied on Feb-

nuary 26, 1959. (R. 1938–1940.) The petition for certiorari, filed on March 18, 1959, was granted on May 4, 1959. (R. 2023; 359 U.S. 982.) The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED[1]

Whether, in the circumstances of this case, the Court of Appeals, having found that the case was submitted to the jury on incorrect instructions, erred in remanding the case for a new trial rather than for entry of a judgment of acquittal, where it also found that the indictment and evidence would have supported a verdict of guilty had the jury been correctly instructed.

STATUTES AND RULES INVOLVED

Sections 371 and 1001, 18 U.S.C.; Sections 145(b) and 3748(a), Internal Revenue Code of 1939; Section 2106, 28 U.S.C.; and Rules 23 and 26, Rules of the United States Court of Appeals for the Ninth Circuit, are set out in the Appendix, *infra,* pp. 42–45.

STATEMENT

On November 19, 1953, petitioner and one Armador A. Seijas were indicted, *inter alia,* for conspiring, continuously from February, 1942, to April 15, 1953, to violate Section 145(b) of the Internal Revenue Code of 1939 by attempting to evade the individual income taxes of Seijas and his wife for the years 1942 through 1945, and for conspiring to violate the false statements

[1] The petition for certiorari (pp. 6–7, 35–45) presented an additional question relating to the jurisdiction of the trial court, which has been abandoned in petitioner's brief on the merits (Br. 2).

provision of the Criminal Code (18 U.S.C., Sec. 1001), as well as Section 145(b) of the Internal Revenue Code, by "furnishing officers and employees of the Treasury Department false books and records, and false financial statements, and by making false statements to such officers and employees for the purpose of concealing from the Treasury Department their share of the unreported income of [Seijas' and petitioner's] partnerships, and for the purpose of concealing from the Treasury Department the true income tax liability of Armador A. Seijas and his wife * * *." (R. 1–6.)[2] Thirty-three overt acts, over a period extending from February 1, 1942, to January 11, 1952, were alleged. (R. 6–19.) Seijas pleaded guilty (R. 829) and testified as a witness for the Government. Petitioner did not testify.

The issues before this Court arise from the defense contention that the prosecution was barred by the applicable six-year statute of limitations. (26 U.S.C. 3748(a), Appendix, *infra*, p. 43.)

THE INSTRUCTIONS TO THE JURY

After testimony had been taken for twelve days, the case was submitted to the jury with specific instructions relating to the statute of limitations issue. The trial judge charged the jury that in order to convict it must find not only that petitioner and Seijas had agreed to wilfully and knowingly attempt to

[2] The indictment as originally drawn alleged other related crimes against the revenue (R. 4–5), but those were withdrawn from the jury's consideration (R. 1805–1806). Seijas alone was charged in the fourteen substantive counts, none of which is before this Court. (R. 3.)

evade Seijas' taxes but that one or more of the overt acts alleged in the indictment was committed within six years prior to the return of the indictment *for the purpose of evading Seijas' taxes.* (R. 1785, 1793–1794, 1801, 1803–1804, 1807, 1809.[3]) The trial judge also charged, however, as follows (R. 1807–1808):

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[3] "In my judgment, the basic fact questions for you to decide in this case are in general, three; first, whether the defendant William R. Forman within the period of time alleged in the indictment knowingly and wilfully entered into an agreement or understanding with one or more other persons to commit the offense against the United States of wilfully and knowingly attempting to evade income taxes as charged in the indictment.

Secondly, whether in pursuance of and following such an understanding or agreement, one or more of the overt acts charged in the indictment intended and tending toward furtherance and accomplishment of the agreement were in fact done by or at the instance of any one or more of the parties to the agreement.

If you find an affirmative answer to the general questions one and two within all the limitations and qualifications that I will explain to you further, then you may find the defendant Forman a party to and a participant in a completed conspiracy. *Now, if you so find, then you must determine the third general and basic question, whether the defendant Forman is subject to prosecution on account of conspiracy under the statute of limitations.*" (R. 1785.)

* * * * *

"* * * The *object of the alleged conspiracy is that of violation* of Section 145(b) of Title 26, by *evading the tax* of Armador A. Seijas and his wife, Betty L. Seijas, and others for the years 1942 to 1945, inclusive, upon their share of the unreported income of the partnerships. * * *" (R. 1801.)

* * * * *

"To determine whether certain alleged overt acts were committed in order to promote the object of the conspiracy, and the applicability of the statute of ilmitations [sic] with respect thereto, you must first determine the duration of the conspiracy. Did it end at some particular time or was there also

> If you find that the defendant Seijas and Forman conspired to attempt to evade the tax liability of Seijas and his wife and others for the years 1942 to 1945, inclusive, you must find the defendant Forman not guilty unless you are convinced beyond a reasonable doubt that *they also conspired to conceal the alleged conspiracy in order to prevent prosecution*

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an agreement between Mr. Seijas and Mr. Forman to continue concealment after 1945 of their activities relating to the amusement company earnings during the years 1941 through 1945 *for the purpose of evading the income tax liability of Seijas, Mrs. Seijas and others?* * * *" (R. 1803–1804.)

* * * * *

"*A conspiracy to commit the alleged offense* referred to in paragraph C of the indictment, *namely, attempted evasion of income tax* owing by Seijas and wife and others for 1942 to 1945, inclusive, and the offense in paragraph D of the indictment, namely, furnishing false books and making false statements to Treasury agents *for the purpose of evading the tax liability of Seijas and wife*, are subject to a six year period of limitation and prosecution of a charge of conspiracy to commit such offenses, if for the purpose of evading income tax liability, must be commenced by return and filing of an indictment within six years of the last overt act *in furtherance of such conspiracy.*" (R. 1807.)

* * * * *

"Summarizing with respect to the statute of limitations, you must * * * find * * *

* * * * *

"Third, that one or more of the alleged conspirators committed an overt act or acts within a period of six years prior to the filing of the indictment herein in furtherance of the conspiracy and during its continuance to accomplish the object of the conspiracy just referred to; namely, *attempted evasion of tax liability of Seijas, Mrs. Seijas and others.*

"If you cannot answer all three of these questions in the affirmative, as shown by the evidence beyond a reasonable doubt, then you must return a verdict of not guilty." (R. 1809—emphasis added.)

therefor and that such additional conspiracy was a continuing one. You cannot imply that there was a continuing conspiracy to conceal the offense from the fact that they may have conspired to attempt to evade the tax liability of Seijas and wife. That is to say, the mere fact that they may have conspired to evade the tax liability of Seijas and his wife for the years in question, if it be a fact, does not warrant the conclusion that they also *conspired to conceal* the commission of the offense. You would have to be convinced beyond a reasonable doubt that *they actually conspired to conceal the conspiracy* and that they committed an overt act or acts in furtherance of *such subsidiary conspiracy.* As previously stated, the understanding or agreement for such conspiracy need not have been entered into by written or formal oral expression, but may be determined from a consideration of the conduct and statements of the parties and all of the evidence as shown by the evidence in the case.

If you find that the defendants only conspired to attempt to evade the tax liability of defendant Seijas and his wife and did not form the additional conspiracy to conceal the same, then *I charge you that the conspiracy to evade the tax liability* of defendant Seijas and his wife, if any there be, was consummated upon the filing of the individual tax *returns of Seijas and his wife for the year 1945 which was filed in March, 1946, and the statute of limitations would run from that time, and if you so find, your verdict would have to be not guilty.*

If you find that *there was no subsidiary conspiracy to conceal* as I have just outlined it to

> you, but acts of concealment were thereafter committed as an after-thought and were conceived after the filing of the returns in March, 1946, then, of course, your verdict must be for the defendant Forman. [Emphasis added.]

This latter "subsidiary conspiracy to conceal" instruction—which the Court of Appeals held to be erroneous, and which both petitioner and the Government agree in this Court was incorrect because it had no place in the case—was given by the trial judge at petitioner's request and without objection by Government counsel.[4]

Petitioner was found guilty (R. 99–100) and was sentenced to three years in prison and fined $10,000 (R. 104–105).

PROCEEDINGS IN THE COURT OF APPEALS

On appeal, petitioner contended, *inter alia*, that the tax evasion conspiracy alleged in the indictment was concluded in March, 1956, when Seijas' 1945 tax return was filed; that the "subsidiary conspiracy" theory—having been neither pleaded nor proved—should not have been submitted to the jury; and that prosecution

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[4] This instruction follows almost verbatim Defendant's Requested Instructed #27. (R. 89–91; Br. 13–14.) It does not appear to have been submitted to the trial judge as a part of the main group of instructions requested by petitioner on August 2, 1956 (R. 91), but as a separate request on August 13, 1956, or on the day testimony was concluded, August 14, 1956 (R. 1536–1539, 1760–1763). The "modification" of the requested instruction (R. 1763) was apparently the addition of the requirement that the overt acts be designed to accomplish the objective of tax evasion (R. 1761, 1763; compare R. 90–91 with R. 1809).

was therefore barred by limitations. The Court of Appeals found that "the proof of the conspiracy to evade Seijas' tax liability was entirely adequate and so strong as to be almost overwhelming" (R. 1928), and that "there was adequate proof * * * that there was an actual subsidiary conspiracy to conceal" (R. 1929). It reversed the conviction, however, on the ground that the prosecution was barred by the statute of limitations.

Quoting extensively from the "subsidiary conspiracy" instruction, the Court of Appeals held that the tax evasion conspiracy was consummated "on the filing of Seijas' tax returns in March, 1946" (R. 1928); that, under *Grunewald* v. *United States*, 353 U.S. 391, the statute of limitations could not be extended on any theory of a "subsidiary conspiracy" to conceal the tax evasion conspiracy (R. 1932–1934); and that "it was error to permit this case to go to the jury" (R. 1935). Accordingly, on September 15, 1958, the court entered judgment remanding the cause to the district court "with directions to enter judgment for the appellant." (R. 1935.)

On October 15, 1958, within the 30-day period provided by Rule 23 of the Ninth Circuit (Appendix, *infra*, p. 44), the Government filed a petition for rehearing,[5] contending that the indictment alleged and the evidence proved a continuing conspiracy to evade Seijas' taxes which was alive at least until January,

[5] The petition for rehearing is reproduced at pages 13–19 of our brief in opposition to certiorari.

1952 (22 months before the return of the indictment); that such conspiracy did not terminate with the filing of the false returns in the years 1943 through 1946, but embraced the fresh attempts, enumerated in the indictment, to evade those taxes in the years 1947 through 1952; that the only flaw in the record was the erroneous "subsidiary conspiracy" instruction;[6] and that since this error could be corrected on a new trial the interests of justice would be best served by remanding the cause for a new trial rather than entry of judgment of acquittal for petitioner.

The Court of Appeals agreed, modified that part of its opinion which held that the tax evasion conspiracy was consummated in 1946, when the last of the tax returns was filed, and ordered the case remanded for a new trial. (R. 1938.) The court stated that "certain of the overt acts listed in the indictment and charged to have occurred in 1948, 1951 and 1952, involving false statements, could well have been in furtherance of and during a conspiracy having as its objective not the concealment of the conspirators' conspiracy but tax evasion." (R. 1937, 261 F. 2d at 183.) Petitioner thereafter filed a petition for further rehearing, which the court denied with a second supplementary opinion. (R. 1939–1940.)

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[6] The fact, disclosed by the record, that the erroneous "subsidiary conspiracy" instruction was initially requested by the petitioner, was not pointed out to the Court of Appeals or to this Court when certiorari was sought, and escaped our attention until the record was fully studied in connection with the preparation of the present brief.

EVIDENCE TO SUPPORT THE VERDICT

To establish its case, the Government offered evidence (1) that petitioner and Seijas conspired continuously from 1942 until 1953 to attempt to evade Seijas' income taxes for the years 1942 through 1945; (2) that during those four years, and in pursuance of their unlawful agreement, the conspirators caused large sums of cash—earned from the operation of their pinball machine partnerships—to be divided equally between them, and to be unrecorded on the books of those enterprises and unreported on the partnership and individual income tax returns; (3) that in 1944, 1947 and 1948, when Treasury agents came to examine the correctness of the returns, the conspirators caused the false partnership books to be turned over to the agents with the representation that they were true; (4) that these representations were relied upon by the Internal Revenue Service, with the result that the Government never learned of the unreported income until 1953; and (5) that as late as 1951 and 1952 Seijas was submitting false written and oral statements to the Internal Revenue Service in pursuance of the objective of the conspiracy, *viz.*, the attempted evasion of his income taxes for the years 1942 through 1945.

The indictment was returned on November 19, 1953 (R. 19), and—inasmuch as the statutory period of limitations applicable here is six years[7]—it was necessary for the Government to prove that one of the

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[7] Sec. 3748(a) of the Internal Revenue Code of 1939, Appendix, *infra*, p. 13.

conspirators committed an overt act in pursuance of the central purpose of the conspiracy after November 19, 1947. The details of the proof may be conveniently summarized in two categories: (1) the conspiracy before November 19, 1947; and (2) the conspiracy after that date.

1. *The Conspiracy Before November 19, 1947.*—In November, 1941, petitioner and Seijas—an attorney—formed a partnership, called the United Amusement Co., to engage in the business of operating pinball machines in Kitsap County, Washington. (R. 348–349, 353–354, 357, 360–361.) Early in 1942 they organized three new pinball partnerships.[8] (R. 361, 373–374.) Petitioner and Seijas had equal interests in the partnerships. (Govt. Exs. 2, 31; R. 143–144, 158, 353, 595, 602, 1238, 1643–1644, 1943, 1948.)

Proceeds of the machines were to be disposed of as follows: After emptying the machines and making appropriate deductions for "pay-outs" and state taxes, the partnerships were to divide the balances evenly between themselves and the location owners. (R. 358–359, 380, 1061.) Early in 1942 petitioner hired one Meyers to do the collecting for the partnerships. (R. 377–378, 1053.) Beginning in mid-1942, and continuing until December, 1945, Meyers, pursuant to petitioner's instructions, followed the practice of extracting "hold-out" money from the collections at some of the more profitable locations. (R. 377–378, 401, 426,

[8] The United Amusement Co. of Bremerton, the American Amusement Co., and the Bremerton Amusement Co. (R. 361, 373–374, 675–676.) These four partnerships are referred to hereinafter as "the partnerships".

1070–1071, 1079.) The "hold-out" money was not reported on the regular receipt forms but was placed in separate sealed envelopes which, along with lists of the pertinent locations, Meyers turned over twice each week to petitioner. (R. 1069–1070, 1072.) If petitioner was away, Meyers would give Seijas the sealed envelopes with petitioner's name written thereon, and Seijas would later turn them over, unopened, to petitioner. (R. 729–730.) After opening the envelopes, petitioner would show Seijas the record of the hold-out money for the current period and would give Seijas his 50% share in currency. (R. 400–402.)

Seijas maintained diaries in which he recorded the amounts and precise sources of the "hold-out" money received by him. (R. 266, 268–270, 403–433.) Seijas testified at the trial that petitioner did not tell him anything about the disposition of his (petitioner's) share, and that he (Seijas) accepted his own 50% share and asked no questions. (R. 402–403.) Before the trial, Seijas had told a Treasury agent and an official of the Internal Revenue Service that petitioner had received 50% of the hold-out money. (R. 303, 315, 1494–1496, 1696.)[9]

Seijas' share of the "hold-out" money, which was received in currency, totalled $86,200 over the period

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[9] The tax deficiencies of petitioner and his wife for the year 1945 alone, resulting from the failure to report the "hold-out" money, was in excess of $21,000. (Govt. Exs. 2, 31; R. 143–144, 158, 1587, 1643–1644, 1943, 1948.) The jury was permitted to use evidence of petitioner's attempts to evade the taxes due on his own distributive share of partnership income "only insofar as it may bear upon the charge against the defendant of conspiracy." (R. 1801; see fn. 15, *infra*, p. 25.)

1942 through 1945. (R. 401–402, 415–416, 461, 463–464, 475–476.) None of the "hold-out" money was recorded on the books or reported on the partnership returns, nor was any of it reported by Seijas or petitioner on their individual income tax returns. (Govt. Exs. 2, 31; R. 143–144, 158, 426, 467–475, 859–860, 1250, 1328, 1353–1354, 1447, 1454–1455, 1643–1644, 1943, 1948.)

On December 27, 1945, the practice of holding out unreported income ceased. (R. 426.) In August, 1946, petitioner ostensibly sold out his remaining interests in the pinball partnerships. (Br. 9–10.) Seijas and petitioner remained partners in other ventures, however, and they continued to occupy the same office until 1953. (R. 554–556.) One Renstrom was (as to all of their common enterprises) their bookkeeper from late 1943 until early 1949. (R. 438, 1238.) In 1944, and again in February, 1947, Treasury agents came to the office to examine the books and records of the pinball machine partnerships. Either petitioner or Seijas referred them to Renstrom who, not knowing that the books were false, turned them over to the agents with the representation that they accurately reflected the income of the partnerships. (Govt. Ex. 43; R. 189, 650–656, 1238, 1250, 1268–1271, 1327–1329, 1350–1353, 1643–1644, 1967.)

2. *The Conspiracy After November 19, 1947.*—During the first half of the conspiracy's life, as has been shown, its central criminal purpose was furthered mainly by three methods: (1) the filing of false tax returns; (2) the maintenance of false books; and (3) the presentation of those false books to Treas-

ury agents assigned to examine the correctness of the tax returns. In the last half of its life, the conspiracy was furthered by (a) the presentation of the same false books to Treasury agents; (b) the submission of a false net worth statement by Seijas to the Internal Revenue Service; and (c) the making of false oral statements by Seijas to Treasury agents.

(a) In the latter part of 1948 a Treasury agent named Clodfelter came to the office of petitioner and Seijas to check into the capital gain realized by them on the sale of the United Amusement Co. in 1945.[10] He talked to both petitioner and Seijas. The same procedure that was followed in 1944 and 1947 was followed in 1948. Clodfelter asked Seijas for the books, including the cash receipts and disbursements book of the United Amusement Co., and Seijas referred him to Renstrom, who, supplying them, represented that they accurately reflected the income of the partnerships. (Govt. Exs. 31, 41; R. 158, 189, 1271, 1342–1344, 1643–1644, 1949, 1952.) Clodfelter

[10] On November 10, 1945, petitioner and Seijas sold the United Amusement Co. (one of the pinball routes) for $44,000, dividing the proceeds equally. (Govt. Ex. 41; R. 189, 595, 601–602, 1643–1644, 1944, 1949.)

The record does not show the exact dates in 1948 on which Clodfelter talked to petitioner and Seijas. Clodfelter testified, however, that after his original report was submitted on April 12, 1948, it was returned to him for reexamination of the capital gain realized by the partners on the sale of the United Amusement Co. route. His subsequent report on that matter was dated December 9, 1948. (Govt. Ex. 41; R. 189, 1340, 1643–1644, 1951.) There was evidence tending to show that such reports were usually written up within a week or ten days after the completion of an examination. (R. 1327, 1331–1332, 1351.)

also examined the copy of the partnership return retained by petitioner. (R. 1341–1342.) Unaware of the fact that the partnership's books did not reflect all receipts, and on the assumption that they did, Clodfelter made only minor adjustments in the tax liability of Seijas and petitioner, which he discussed with both of them.[11] (Govt. Exs. 41, 42; R. 189, 1344, 1348–1349, 1643–1644, 1951–1965.) Clodfelter testified that if he "had known there was unreported income, [he] certainly would have taken an interest in it and investigated much more thoroughly." (R. 1349.)

(b) In July 1951, at a time when Treasury agents were investigating his income for the years 1942 through 1949, Seijas retained one Whittle, an accountant, to prepare a net worth statement for those years, as requested by the agents. (R. 243–245, 285, 702.) Whittle prepared the statement—from records and information submitted to him by Seijas—for the purpose of showing the Government what Seijas' correct tax liability was for the years 1942 through 1949. The statement disclosed no unreported income for the years 1942 through 1945. Based, in part, upon an estimated $50,432.57 of undeposited cash on hand as of December 31, 1945, it did, however, indicate that Seijas had received unreported income of approximately $165,000 during the years 1946 through 1948. (Govt.

[11] Clodfelter disallowed a portion of the long-term capital gain claimed on the sale of the United Amusement Co., holding that it should have been treated as a short-term capital gain. The result of this adjustment was to increase the taxable income of Seijas and petitioner by $1,967.64 each. (Govt. Exs. 41, 42; R. 189, 1643–1644, 1956–1957, 1963.)

Ex. 74; R. 245–249, 256–258, 287–288, 298, 722, 1643–1644, 1980–1981.) On or about December 28, 1951, Whittle submitted the net worth statement to Seijas, and it was then turned over to the Internal Revenue Service. (R. 247–248.)

(c) On January 11, 1952, Seijas, interviewed by the agents, stated that he believed that he had properly reported his income up to the year 1945 (R. 1551–1552), and that he had "no recollection and no way of knowing where" (R. 1474) the $165,000 in excess assets had come from.[12] Whittle then engaged in a series of conferences with representatives of the Internal Revenue Service during the first half of 1952, in an attempt to settle Seijas' case on a civil basis. (R. 706–708.) During 1952, on several occasions when the Treasury agents came to see Seijas and were shown to his private office, petitioner departed; Seijas advised the agents that petitioner was out of town, and talked to the agents himself. (R. 860.) Whittle asked Seijas on many occasions where the $165,000 had come from, but received no explanation until 1953. (R. 251, 262–263, 709–712.)

Early in 1953, after the agents had recommended criminal prosecution against Seijas, Seijas showed Whittle his diaries for 1942 through 1945 which listed

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[12] Petitioner has printed as a part of the record in this Court (R. 1990–2007) Government's Exhibit No. 139–A for identification—the transcript of the interview between Seijas and the agents on January 11, 1952—and relies upon portions of it (Br. 58, 59, 62–67). The trial record discloses, however, that this exhibit was never admitted in evidence, having been excluded on the objection of defense counsel. (R. 1530, 1546–1551, 1650–1651.)

his share of the "hold-out" money from the partnerships. (*Supra*, pp. 11–13.)[13] Seijas retained an attorney, on Whittle's advice, and the three discussed the advisability of disclosing the diaries to the Government, concluding that they had better (R. 275) "produce these diaries for the purpose of trying to eliminate criminal prosecution" (R. 263–274, 296).

At a conference arranged with officials of the Internal Revenue Service, Seijas was advised, on April 15, 1953, that his case had been referred to the Department of Justice with a recommendation that he be prosecuted for evasion of income taxes for 1946, 1947 and 1948. (R. 274–275, 306–307.) Seijas then contended that he had not evaded his taxes for those years; that he had had a large amount of cash on hand at the end of 1945; that approximately $100,000 had been accumulated from businesses other than the pinball partnerships and from transactions with members of his family; that $86,000 had been accumulated from his share of the "hold-out" money from the pinball partnerships during the years 1942 through 1945, and that petitioner had also received $86,000 from the same source. (R. 309–315.) Further with respect to the $86,000, Seijas produced four diaries (*supra*, p. 12), containing many "hold-out" slips showing, in petitioner's handwriting, computations of the 50–50 split (R. 315–318, 428–433). Seijas further stated that instead of approximately $50,000 of cash on hand at the end of 1945—as indicated in the net worth statement submitted at the close of 1951—the correct

[13] A total of $86,427.42, according to Whittle's later computation. (R. 266–270.)

amount was more than $200,000, and that it had been kept in safe deposit boxes in Portland, Seattle and San Francisco. (R. 256, 318.)

Shortly before the April 15, 1953, conference, petitioner knew that Seijas intended to disclose his diaries to the Internal Revenue Service, and objected that it was not "a good policy." (R. 853, 859.) Seijas replied, however, that it was all right because the statute of limitations barred petitioner's prosecution. Petitioner replied that he could understand the position in which Seijas found himself. (R. 858–859.)

SUMMARY OF ARGUMENT

The indictment here alleged that petitioner and Seijas engaged in a continuing conspiracy—beginning in 1942 and ending in 1953—to attempt to evade the taxes owed by Seijas on his share of the unreported income from the partnerships "by furnishing officers and employees of the Treasury Department false books and records, and false financial statements, and by making false statements to such officers and employees." The proof clearly establishes that there was such a conspiracy. The two conspirators received, and divided equally between themselves, $172,000 of unreported income from the partnerships during the years 1942 through 1945, none of which was recorded on the books or reported on the tax returns. In the course of three audits by Treasury agents the false books of the partnerships were presented by the conspirators—and accepted by the agents—as accurately reflecting the income of the partnerships. At least five overt acts were committed within six years of the return of the indictment, in furtherance of the conspiracy to evade.

The Court of Appeals' remand for a new trial was "just" and "appropriate" under Section 2106 of the Judicial Code because the error below, deriving solely from the "subsidiary conspiracy" instruction requested by petitioner, can be corrected on a new trial. *Grunewald* v. *United States*, 353 U.S. 391, 406–415. Here, as in *Grunewald*, the proof would have supported a jury finding, under proper instructions, that the overt acts committed within the period of limitations were for the purpose of furthering the objective of the conspiracy alleged in the indictment, namely, to evade taxes.

The Court of Appeals initially remanded "with directions to enter judgment for the appellant", based on its erroneous conclusion that prosecution was barred by limitations. But its subsequent order remanding the case for a new trial, made after the Government filed a timely petition for rehearing, did not violate petitioner's constitutional protection against double jeopardy. Petitioner, who had requested the erroneous "subsidiary conspiracy" instruction, waived any objection to a new trial by moving for a new trial in the District Court, and by appealing his conviction. Moreover, the original judgment of the Court of Appeals directing remand for entry of a judgment of acquittal was not a final order, but was subject to further review on rehearing. The court below did not exceed its powers in modifying its original opinion and order—so as to correct the major error of law resulting in the order for acquittal (i.e., that the conspiracy to evade terminated in 1946)—and in ordering a new trial. The filing of

the petition for rehearing suspended the finality of the Court of Appeals' judgment.

ARGUMENT

THE COURT OF APPEALS WAS CORRECT IN HOLDING THAT PROSECUTION IS NOT BARRED BY LIMITATIONS AND THAT, IN VIEW OF THE ERRONEOUS INSTRUCTIONS TO THE JURY, JUSTICE REQUIRES A NEW TRIAL RATHER THAN ENTRY OF JUDGMENT OF ACQUITTAL FOR PETITIONER

A. INTRODUCTORY

The essentials of this case are as follows: The indictment was returned on November 19, 1953, charging (as to petitioner) participation in a criminal conspiracy extending from 1942 to 1953 with respect to evasion of income tax for the years 1942 to 1945. In view of the applicable six-year statute of limitations, the prosecution was barred unless the conspiracy continued at least until November 19, 1947. Thus, if the conspiracy came to an end in March, 1946, when the last tax returns involved were filed, the prosecution could not be maintained. If, however, the indictment alleged, and the proof showed, a conspiracy which extended beyond November 19, 1947, the prosecution was not barred. The Government could, conceivably, have sought to meet this burden by proceeding on one or both of two independent theories as to the nature of the conspiracy:

(1) That a principal object of the conspiracy was to consummate the attempted tax evasion, not merely by filing false returns, but also by thereafter making false statements to the revenue agents or engaging in other like acts. This theory of the offense may, for shorthand purposes, be called the *Beacon Brass* theory

(cf. *United States* v. *Beacon Brass Co.*, 344 U.S. 43, 46).

(2) That a subsidiary but essential part of the conspiracy was an agreement to conceal its existence after its main purpose was accomplished. This may be referred to as the *Grunewald* theory (cf. *Grunewald* v. *United States*, 353 U.S. 391). In that case this Court held that such a "subsidiary conspiracy" may not be implied from circumstantial evidence showing merely that the conspiracy was kept a secret and that the conspirators took care to cover up their crime in order to escape detection and punishment. (353 U.S. at 399–402.)

In the instant case, as we shall show, the indictment was drawn on the *Beacon Brass*, and not the *Grunewald*, theory of a continuing conspiracy extending after November 19, 1947. Moreover, as we shall also show, the Government's evidence at the trial showed overt acts after that date from which the jury could find a continuing conspiracy of attempted tax evasion, and the Government presented the case to the jury on that theory. (R. 124–126, 1700, 1765, 1770, 1774, 1779–1780, 1781.) As appears in the Statement, *supra*, pp. 4–5, fn. 3, the charge to the jury contained an adequate *Beacon Brass* instruction. Thus, if nothing more were involved, the case would present no difficulties with respect to the statute of limitations point. Unfortunately, however, at petitioner's instance, the *Grunewald* theory—which, as the Court of Appeals correctly held and both parties here agree, has no place whatsoever in this case—was injected into the trial by the addition to the charge of a "subsidiary conspiracy to conceal the

main conspiracy" instruction.[14] At that point, Government trial counsel should have objected, but he did not do so. The trial judge was thus led by both sides into the error, which has complicated this case, of giving the *Grunewald* instruction in addition to the one correctly given by the court, over petitioner's objection, based on the *Beacon Brass* theory. Since the conviction came after such an erroneous and confusing charge, the Government accepts the decision of the Court of Appeals setting aside the conviction and ordering a new trial. Review in this Court is thus limited to the questions presented by petitioner's contention that the Court of Appeals erred in not going further and ordering that the case be remanded to the District Court with directions to order a judgment of acquittal.

The Government submits that if, as we believe to be clear, the indictment and the evidence would support a conviction under the *Beacon Brass* theory, petitioner is not entitled to a judgment of acquittal because of the erroneous instruction for which he was, initially at least, responsible. This conclusion

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[14] The requested "subsidiary conspiracy" instruction (R. 89–91; Br. 13–14) was given to the jury in almost the precise language drawn by petitioner (R. 1807–1808). Petitioner cited, as his "sole authority for the instruction, *United States* v. *Grunewald*, 233 F. 2d 556 (C.A. 2d). The pertinent holding in that case was reversed by this Court while the case at bar was pending in the Ninth Circuit. *Grunewald* v. *United States*, 353 U.S. 391. But, as petitioner pointed out to the Court of Appeals in a brief filed before the reversal in *Grunewald* (citing *Krulewitch* v. *United States*, 336 U.S. 440), the "subsidiary conspiracy" theory has no place in the case at bar because the indictment alleges no such conspiracy, nor any overt act in furtherance thereof.

is supported by the *Grunewald* case itself in which a not dissimilar situation was presented. There also, the case was submitted to the jury on an erroneous theory when it could properly have been submitted on a correct theory which had been sufficiently alleged in the indictment and substantiated by the evidence at the trial. The relief ordered by this Court was a new trial, not a judgment of acquittal. The same disposition is indicated here. Moreover, no problem of double jeopardy is presented. Petitioner, by moving for a new trial and by appealing from the judgment of conviction, thereby opened the whole record for such disposition as justice may require. He was not acquitted by the jury; and the order of the Court of Appeals directing a new trial was no less a valid and proper exercise of its appellate powers because it came after a timely petition for rehearing rather than upon the original hearing of the appeal. Even in a criminal case, the jurisdiction of an appellate court to dispose of the case is not affected or reduced because its action comes after rehearing.

B. THE INDICTMENT ALLEGED, AND THE EVIDENCE PROVED, A CONTINUING CONSPIRACY TO ATTEMPT TO EVADE SEIJAS' TAXES, WHICH PERSISTED AT LEAST UNTIL JANUARY, 1952

The indictment alleged a continuing conspiracy beginning in February, 1942, and ending on or about April 15, 1953, between Seijas and petitioner to defraud the United States by (1) attempting to evade a large portion of the income taxes owed by Seijas and his wife for the years 1942 to 1945, inclusive, upon their share of the unreported income of the

partnerships, in violation of Section 145(b) of the Internal Revenue Code of 1939 (Appendix, *infra*, pp. 42–43); and (2) to violate the same provision, as well as Section 1001 of the Criminal Code (18 U.S.C. 1001), by (R. 5–6):

> furnishing officers and employees of the Treasury Department false books and records, and false financial statements, and by making false statements to such officers and employees for the purpose of concealing from the Treasury Department their share of the unreported income of the aforesaid partnerships, and for the purpose of concealing from the Treasury Department the true income tax liability of Armador A. Seijas and his wife, Betty L. Seijas, for the years 1942 to 1945, inclusive.

The indictment specified thirty-three overt acts which, in substance, alleged that the conspiracy, in its early years, was effected principally by maintaining false books and records, and filing false partnership and individual income tax returns (R. 6–14); and, in its later years (*i.e.*, between 1947 and 1952), by presenting false books and records to officials of the Treasury Department, and making false oral statements to them (R. 15–19).

The evidence, which the court below found to be "almost overwhelming" (*supra*, p. 8), fully established the existence of this continuing conspiracy to attempt to evade taxes. There was proof that from mid-1942 until December, 1945, the collector on the pin-ball routes, acting on petitioner's instructions, systematically withheld substantial gross receipts from the amounts reported to the bookkeeper as in-

come; that such "hold-out" money was turned over to petitioner (occasionally to Seijas) semi-weekly by the collector; that petitioner, who was a 50% partner with Seijas in all four partnerships, retained his half of the "hold-out" money [15] and turned the other half over to Seijas as it was received; and that the total thus received by the conspirators was approximately $172,000. (*Supra*, pp. 11–13.) It was also shown that the conspirators caused false sets of books to be maintained wherein none of this $172,000 was recorded as income; that the partnership returns were in agreement with these false books; that neither Seijas nor petitioner reported any of the $172,000 as income on their individual tax returns; and that the conspirators followed the invariable practice—when agents of the Internal Revenue Service would come to examine the correctness of those returns—of referring them to the bookkeeper, who, in turn, would present the false books to them, representing that they accurately reflected the income of the partnerships. (*Supra*, pp. 13–15.) [16] The evidence further proved that when Sei-

[15] On the evidence bearing on petitioner's own tax liability, the trial court charged the jury as follows (R. 1801–1802): "The defendant Forman is not charged with tax evasion of his own taxes, and, accordingly, you can consider such evidence only insofar as it may bear upon the charge against the defendant of conspiracy. * * * An act by defendant Forman to evade the tax due upon his distributive share of such income, if such there was, could be considered by you in determining if it resulted from an agreement between the partners Forman and Seijas along with all other evidence in the case bearing on that matter."

[16] The result was that in the course of three examinations by Treasury agents (in 1944, 1947 and 1948) there were assessed against the conspirators only comparatively minor tax de-

jas came under intensive investigation in 1951, he submitted a false net worth statement to the Internal Revenue Service which concealed the existence of his prior accumulated "hold-out" receipts, and that as late as January 11, 1952, Seijas made two false oral statements to Treasury agents. (*Supra*, pp. 15–16.) Indeed, it was not until April 15, 1953, when Seijas, in an attempt to avoid prosecution for evasion of taxes in later years, disclosed the "hold-out" scheme to the Internal Revenue Service—that the Government had any knowledge of the $172,000 of unreported income. (*Supra*, pp. 16–18.) The conspiracy was terminated on that date. *Fiswick* v. *United States*, 329 U.S. 211, 217; *United States* v. *Kissel*, 218 U.S. 601, 607–608. The indictment was returned seven months later. (R. 19.)[17]

Petitioner contends (Br. 41–48) that the conspiracy came to an end in 1946, when the false income tax returns for 1945 were filed, and argues that the acts committed in later years were designed only to conceal an already executed crime. Concededly, the substantive offense of wilfully attempting to evade a tax *by filing a false and fraudulent return* is complete when the return is filed, and the cases relied upon by petitioner (Br. 42) go no further than this. But the

fidelities. (*Supra*, p. 15, fn. 11; R. 1327, 1329, 1353–1354, 1962, 1967.)

[17] The indictment was returned on November 19, 1953 (R. 19), and it was necessary, therefore, that the Government prove that an overt act in furtherance of the conspiracy was committed after November 19, 1947. Sec. 3748(a) of the Internal Revenue Code of 1939, 26 U.S.C. (1952 ed.) Sec. 3748(a); *Grunewald* v. *United States*, 353 U.S. 391, 396–397; *Fiswick* v. *United States*, 329 U.S. 211, 216; *Brown* v. *Elliott*, 225 U.S. 392, 401.

proscription in Section 145(b) of the Internal Revenue Code of 1939 (*infra*, pp. 42–43) against wilfully attempting to evade a tax "in any manner" contemplates other means of attempted evasion. As this Court has said, it is "clearly broad enough to include false statements made to Treasury representatives for the purpose of concealing unreported income." *United States* v. *Beacon Brass Co.*, 344 U.S. 43, 45–46. Accordingly, if such false statements are substantive offenses of tax evasion under Section 145(b), *a fortiori* they qualify as overt acts in furtherance of a tax evasion conspiracy. Cf. *Braverman* v. *United States*, 317 U.S. 49, 53. It follows that the tax evasion conspiracy in the instant case was shown by the proof to have been in existence during the years 1947 through 1951, and at least until January 11, 1952, when Seijas falsely stated to the Treasury agents (overt acts No. 32 and 33–R. 18–19) that he believed his income for the years 1942 through 1945 had been correctly reported on his returns and that he had no idea as to where his excess funds in later years had come from. (*Supra*, p. 16.) In holding that the conspiracy to evade terminated in 1946 (R. 1928), the initial opinion of the Court of Appeals, as it later recognized, was irreconcilable with the rationale of *Beacon Brass*. The Court of Appeals properly corrected its error in its opinions on rehearing.

The Court of Appeals correctly held that prosecution was not barred by limitations, and that the case could properly be retried on the *Beacon Brass* theory. The question whether the overt acts committed by the conspirators after November 19, 1947, were motivated

only by a desire to conceal an already executed crime so as to avoid prosecution, or "were at least partly calculated to further" the objective of the conspiracy alleged in the indictment—tax evasion—(*Grunewald* v. *United States*, 353 U.S. 391, 415) was, of course, a question of fact. But, clearly, the jury could reasonably have found—under proper instructions—that the evasion conspiracy was still alive after November 19, 1947. As shown *supra*, the record demonstrated a consistent course of conduct engaged in by the conspirators continuously from 1942 until 1952, designed and executed for the purpose of evading income taxes.

Petitioner's contention reduces itself to this: that after a false return is filed, the six-year limitation period begins to run, and any affirmative acts of tax evasion committed thereafter cannot serve to show continuation of the tax evasion conspiracy. However, if the subsequent acts constitute new substantive offenses of tax evasion, as this Court held in *Beacon Brass*, it would seem to follow that they can qualify as overt acts evidencing a conspiracy to effectuate an evasion of taxes.

Petitioner's contention that "the making of false statements and submission of false records to Treasury employees * * * [were themselves] the sole objective of the conspiracy and the sole means by which it was to be accomplished" (Br. 49) is clearly erroneous. The objective of the conspiracy was tax evasion, or, to put it another way, to consummate a design or scheme having as its purpose the successful evasion of taxes. The conspiracy was characterized in its earlier years by the keeping of false books and the filing of false returns, all spelled out in the indictment as overt

acts. (R. 6–14.) The making of false statements and the submission of false records, also characterized as overt acts in the indictment, were merely additional means (R. 5–6) by which that conspiracy, in its later phases, was to be carried out. It was unnecessary to allege the means by which the conspiracy was to be carried out at each stage of its existence. *Frohwerk* v. *United States*, 249 U.S. 204, 209. It was sufficient that the evidence clearly demonstrated the precise methods and means employed by the conspirators at the various pertinent times, and that they were all directed toward the central purpose of evading the income taxes of Seijas and his wife.

Petitioner's further contention (Br. 52–68), that the proof failed to show the commission, within the period of limitations, of an overt act in furtherance of the conspiracy to evade, does not require extended refutation. The Government was required to prove only that one such overt act was committed after November 19, 1947 (*supra*, p. 26, fn. 17). There was ample proof of overt acts #24 and #29[18] (R. 15, 17; see

[18] Petitioner urges that since Agent Clodfelter's second examination of the books in 1948 "did not involve any 'official re-examination' of the operating 'hold-out' income which is the subject matter of the alleged conspiracy" (Br. 53), overt act #24 was not in furtherance of the conspiracy. But the Government did not even learn about the "hold-outs" until 1953, when Seijas disclosed the conspiracy and produced his diaries, and the fact that in 1948 Clodfelter was unaware of the $172,000 of unrecorded and unreported partnership income in earlier years bespeaks the success of the conspiracy up to that time. The important fact is that Seijas caused the false partnership books to be presented to Clodfelter in 1948 (*supra*, pp. 14–15), as the indictment alleged (R. 15).

(fn. cont. next page)

supra, pp. 14–15, fn. 10). And surely there can be no question that overt acts #31, #32 and #33 (R. 18–19) were committed in furtherance of the conspiracy to evade. These three overt acts comprise the submission of Seijas' false net worth statement to the Internal Revenue Service on December 29, 1951 (R. 1505), and the two false oral statements made by Seijas to the Treasury agents on January 11, 1952.[19]

The net worth statement, prepared by Whittle from records and information supplied by Seijas, concealed the fact that Seijas had some $150,000 in currency on hand at the end of 1945. (*Supra*, pp. 15–18; R. 659.) If the existence of this asset had been disclosed to the Government in 1951, there would undoubtedly have been an investigation (as

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As for overt act #29, petitioner argues (Br. 54) that since only his own taxes were involved in the agent's examination, he could not possibly have been trying to further the conspiracy to evade Seijas' taxes by concealing the fact that he (petitioner) had received unreported income from the partnerships. The jury was entitled to infer, however, (fn. 15, p. 25, *supra*), that each of the conspirators was protecting the other in order to protect himself, inasmuch as they shared equally in the unreported income.

As to the evidence supporting these two overt acts, see *supra*, pp. 14–15.

[19] Petitioner, treating the three acts as one (Br. 55–69), views the evidence in the light most unfavorable to the verdict, which he may not do at this stage of the case. *Glasser* v. *United States*, 315 U.S. 60, 80; *Martinson* v. *United States*, 322 U.S. 369, 374; *Abrams* v. *United States*, 250 U.S. 616, 619. Moreover, in evaluating the acts, he relies to a substantial degree (Br. 58, 59, 62–67) upon evidence (the transcript of the interview between Seijas and the agents on January 11, 1952) which was never before the jury, having been offered by the Government but rejected on the objection of defense counsel (fn. 12, p. 16, *supra*).

distinguished from the routine audits conducted in 1944, 1947 and 1948 (*supra*, pp. 13–15)) with respect to the income earned by the partnerships in the years 1942 through 1945.[20] The false statements made by Seijas on January 11, 1952, were proved (*supra*, p. 16) as alleged (R. 18–19). The statement that he believed he had correctly reported his income for the years 1942–1945 was plainly false, and Seijas knew it was false when he made it. (R. 659.) Seijas' statement that he had "no recollection and no way of knowing where" (R. 1474) he had obtained the unaccounted for $165,000 which showed up in his visible net worth as of the end of the years 1946 through 1948, was equally false. Seijas knew it was false because his diaries, listing his share of the unreported income from the partnerships in the earlier years, accounted for more than half of the mysterious $165,000. The jury could easily conclude that these false oral statements, as well as the submission of the false net worth statement, were made in furtherance of the conspiracy. And all three acts were, as a matter of law, attributable to petitioner as much as to Seijas. *Pinkerton* v. *United States*, 328 U.S. 640, 646; *Brown* v. *Elliott*, 225 U.S. 392, 400–401; *Fiswick* v. *United States*, 329 U.S. 211, 217.

[20] Although the last overt act shown to have been committed by petitioner took place in 1948 (fn. 18, p. 30, *supra*), he remained a member of the conspiracy until early in 1953. The fact that he took no affirmative action to disassociate himself from the conspiracy (*Pinkerton* v. *United States*, 328 U.S. 640, 646; *Hyde* v. *United States*, 225 U.S. 347, 369) is manifest from his objection to Seijas' disclosure of the diaries, shortly before the conference of April 15, 1953. (*Supra*, p. 18.)

We submit that the evidence amply established what the indictment alleged: that petitioner and Seijas conspired continuously from 1942 until 1953 to attempt to evade the taxes of Seijas and his wife. Had the case been submitted to the jury under proper instructions, therefore, a verdict of guilty could have been validly returned. Accordingly, as we shall now show, the interests of justice call for a new trial, as the Court of Appeals has held.

C. THE REMAND FOR A NEW TRIAL WAS A "JUST" AND "APPROPRIATE" DISPOSITION OF THE APPEAL

Petitioner contends (Br. 36–40): (1) the Court of Appeals' remand of this case for a new trial was not a "just" or "appropriate" disposition within the meaning of Section 2106 of the Judicial Code (28 U.S.C. 2106); and (2) on that issue, this case is distinguishable from *Grunewald* v. *United States*, 353 U.S. 391. Neither contention has merit.

The claim (Br. 37–40) that the order for a new trial was neither "just" nor "appropriate" rests in substance on petitioner's premise that the trial judge should have granted his motion for acquittal. As we have shown, however (*supra*, pp. 23–32), such action would have been entirely unwarranted. We come, therefore, to the question whether, in the circumstances, a new trial would be improper.

We submit that the disposition of the *Grunewald* case by this Court underscores the correctness of the remand for new trial here. In *Grunewald* the indictment charged that the defendants had conspired (1) to "fix" criminal tax cases by means of bribery and

improper influence, and (2) to conceal the acts of the conspirators. Under the three-year statute of limitations there applicable, it was necessary for the Government to prove that the conspiracy "was still in existence on October 25, 1951, and that at least one overt act in furtherance of the conspiracy was performed after that date." (353 U.S. at 396.) Grunewald contended that the object of the conspiracy was a narrow one: to obtain "no prosecution" rulings from the Internal Revenue Service with respect to the two cases in question. Since the last of the rulings was obtained in January 1949, under Grunewald's hypothesis the tax-fixing conspiracy could not have been in existence in October 1951. The Government contended (1) that even if the main object of the conspiracy had been accomplished in 1949, it had charged and proved the existence of a subsidiary conspiracy to conceal the conspiracy to "fix" (to the end that the conspirators would escape detection and punishment), and that overt acts in furtherance of that conspiracy had been performed after October 1951. Alternatively, the Government contended (2) that the main object of the conspiracy was not merely to obtain "no prosecution" rulings from the Internal Revenue Service, but to obtain absolute immunity from criminal tax prosecution for the "clients" of the tax-fixing combine, and that the main object was not accomplished until 1952, when the six-year statute of limitations barred prosecution of those "clients" for attempting to evade their income taxes.

This Court, rejecting the Government's first contention, held that after the central criminal purposes

of a conspiracy have been finally frustrated or attained, the running of the statute of limitations cannot be extended merely by showing—under a "subsidiary conspiracy" theory—that the conspirators subsequently took steps to cover up their crime in order to escape detection and punishment. (353 U.S. at 403–406).[21] However, the Court found the legal theory of the Government's second and alternative contention "unexceptionable" (353 U.S. at 408), and held that there was sufficient allegation and proof to enable the jury to conclude (1) that the "no prosecution" rulings were only the first "installment" of what the conspirators set out to do; (2) that the main object of the conspiracy was not accomplished until 1952, when the six-year statute of limitations barred prosecution of the conspirators' "clients" for evasion of their taxes; and (3) that the overt acts of concealment occurring after 1949 might well have been "motivated at least in part" by the purpose of furthering the main objective of such a conspiracy. (353 U.S. 408–409.) The Court found, however, that this al-

[21] Petitioner quotes from this portion of the *Grunewald* opinion in support of his contention that the holding by the court below in the instant case would "extend the life of a conspiracy indefinitely" (Br. 47). But, as we have shown (*supra*, pp. 20-23), the "subsidiary conspiracy" was not even alleged in this indictment and is wholly irrelevant to this case except insofar as the instruction on the subject tainted the charge to the jury. The statute of limitations applicable here would have barred prosecution after January 11, 1958 (six years after the commission of the last overt act) and no amount of investigation to unearth additional overt acts could have resulted in extending the period of limitations beyond April 15, 1959, because the conspiracy terminated on April 15, 1953.

ternative theory had not been adequately submitted to the jury and, accordingly, remanded for a new trial.

Thus, the following close parallels exist between *Grunewald* and the case at bar: (1) In each case the indictment alleged a continuing conspiracy. (2) In each case there was evidence in the record from which the jury could have found—under proper instructions—that the defendants were guilty. (3) In each case the proof showed the commission, within the period of limitations, of overt acts which may have been designed to further the main objective of the conspiracy. (4) In each case the instructions to the jury were sufficiently ambiguous so as to foreclose the certainty that in reaching their verdict the jury had found that the commission of overt acts within the period of limitations was "motivated at least in part" (353 U.S. at 408–409) by the purpose of furthering the main objective of the conspiracy. (5) In both cases the convictions were reversed and a new trial was ordered.

The case at bar in this aspect is thus indistinguishable from *Grunewald*. Petitioner is no more entitled to a judgment of acquittal here than were the defendants in *Grunewald*. The remand for a new trial here is "just" and "appropriate", for the same reasons that impelled this Court to order a new trial in *Grunewald*.[22]

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[22] Petitioner attempts to distinguish *Grunewald* on the grounds that (1) there the alternative "theory was, in fact, submitted" (Br. 36) to the jury—which is equally true in the case at bar—and (2) Grunewald "requested submission of the alternative theory to the Jury" (Br. 36)—which is not correct. The defendants in *Grunewald* requested no such instruction.

Petitioner contends (Br. 20–36) that, in the circumstances, subjecting him to a new trial would violate his Fifth Amendment protection against double jeopardy. We submit this contention is without merit.

In its original opinion, the Court of Appeals reversed petitioner's conviction on the ground that it was barred by limitations, holding that the tax evasion conspiracy "was consummated, as the court told the jury, on the filing of Seijas' tax returns in March, 1946." (R. 1928, 1932–1934.) The opinion ordered the cause "remanded with directions to enter judgment for the appellant." (R. 1935.) In its second opinion (after the Government's timely filing of a petition for rehearing) the Court of Appeals—explaining that in its original "opinion we accepted the position taken by the court below in its instructions that the conspiracy charged 'was consummated upon the filing of the individual tax returns'" (R. 1936), but that "We now think that the record does not require a conclusion that the conspiracy here was consummated" at that time (R. 1938)—modified its first opinion so as to remand the case for a new trial (R. 1938).

It is settled that a defendant can be tried a second time for an offense when his prior conviction for

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They took the position at the trial, and maintained it through all stages of the appeal, that the conspiracy had terminated more than three years before the indictment was returned and hence that prosecution was barred by the statute of limitations there applicable. *Grunewald* v. *United States* (Nos. 183, 184, 186, October Term, 1956—R. 550, 555–558, 711, 754, 759, 771, 775).

that same offense has been set aside on appeal. Here, petitioner effectively waived his protection against double jeopardy. Petitioner himself generated the trial court's error by requesting the erroneous "subsidiary conspiracy" instruction (*supra*, pp. 5–7), and he also (a) moved for a new trial in the District Court,[23] and (b) appealed from his conviction. In such circumstances, an appellate court's remand for a new trial violates no constitutional protection against double jeopardy. *Bryan* v. *United States*, 338 U.S. 552, 560; *United States* v. *Ball*, 163, U.S. 662, 672, and cases cited; *United States* v. *Shotwell Mfg. Co.*, 355 U.S. 233, 243; cf. *Green* v. *United States*, 355 U.S. 184, 189. In the *Ball* case, the Court stated (163 U.S. at 672):

> * * * it is quite clear that a defendant, who procures a judgment against him upon an indictment to be set aside, may be tried anew upon the same indictment, or upon another indictment, for the same offence of which he had been convicted * * *.

Petitioner mistakenly treats the Court of Appeals' original judgment directing remand of the case for entry of a judgment for petitioner as if it were equivalent to a verdict of acquittal in the District Court. That judgment, however, was of course subject to revision on rehearing. In taking his appeal from the judgment of conviction, petitioner subjected himself

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[23] The motion alleged, *inter alia*, that the court had erred in instructing the jury and that the prosecution was barred by limitations. (R. 101–102.)

to the power of the "court of appellate jurisdiction * * * [to] affirm, modify, vacate, set aside or reverse * * * [the] judgment * * * and [to] * * * remand the cause and direct the entry of * * * [an] appropriate * * * order, or require such further proceedings to be had as may be just under the circumstances." (28 U.S.C. 2106, Appendix, *infra*, p. 44.)

Under this statute and the established practice in the federal judicial system, this Court and the courts of appeals customarily rehear cases over which they have jurisdiction, and indeed Congress has expressly so recognized. (28 U.S.C. 46.) The Court of Appeals' first opinion was rendered on September 15, 1958. (R. 1923–1935.) The disposition of the case made in that opinion (R. 1935) was interlocutory in the sense that it was subject to further action on rehearing.[24] *Dept. of Banking* v. *Pink*, 317 U.S. 264, 268; *Comm'r* v. *Estate of Bedford*, 325 U.S. 283, 287; *Citizens Bank* v. *Opperman*, 249 U.S. 448, 450. On October 27, 1958, the court amended its earlier opinion (*supra*, pp. 9, 36), and ordered a new trial (R. 1936–1938). On February 26, 1959, the court wrote a third opinion, denying petitioner's petition for a further hearing. (R. 1938–1940.) It was not until that date that the appellate court's judgment "in fact fully adjudicated rights and that that adjudication * * * [was] not subject to [its] further review." *Dept. of Banking*

[24] The timely filing of the Government's petition for rehearing prevented the issuance of a mandate to the District Court, under the Ninth Circuit's Rules 23 and 26. (Appendix, *infra*, pp. 44–45.)

v. *Pink, supra,* p. 268. The filing of the Government's timely petition for rehearing "operate[d] to suspend the finality of the * * * court's [original] judgment, pending the court's further determination whether the judgment should be modified so as to alter its adjudication of the rights of the parties." (*Id.*, p. 266.)

In contending that retrial here would subject him to double jeopardy, petitioner mainly relies (Br. 23–24) upon *Sapir* v. *United States,* 348 U.S. 373. In *Sapir* (No. 534, October Term, 1954), the defendant was convicted of conspiracy to defraud the United States by wrongfully converting Government property to his own use. There was a total lack of evidence with respect to an essential element of the offense charged. Accordingly, the Court of Appeals for the Tenth Circuit reversed the conviction and ordered the indictment dismissed. Later, after the Government had filed a petition for rehearing setting forth some "newly discovered evidence", the court modified its opinion to provide for a new trial. In his petition for a writ of certiorari the defendant urged (1) that the Government could not rely upon evidence outside the record in urging a new trial; (2) that the Court of Appeals lacked the power to order a new trial because defendant had not requested a new trial, either in the District Court or on appeal; and (3) that a second trial would subject the defendant to double jeopardy. This Court, in a short *per curiam* opinion, vacated the judgment directing a new trial and, because it was "correct", reinstated the appellate court's original judgment remanding the cause with instructions to dismiss the indictment. (348 U.S. at 373.)

The distinctions between *Sapir* and the instant case are apparent. The order for a new trial in *Sapir* was based on evidence outside the record; here, the Government's position rested entirely on evidence in the record. Sapir did not move for a new trial in the District Court (Pet. 6, 10–11—*Sapir* v. *United States*, No. 534, October Term, 1954); here, petitioner did (R. 101–102, *supra*, p. 37, fn. 23).[25] But, more importantly, the *Sapir* case did not rest on any lack of *power* in the Court of Appeals to revise its original judgment on rehearing; rather, this Court's reversal was based on its view as to the merits of the action taken by that court.

We need hardly point out, in conclusion, that acceptance of petitioner's contention would mean the abolition of the power of the courts of appeals and this Court to rehear cases in which they had initially, but erroneously, reversed convictions and remanded with directions to acquit.[26] If petitioner is right, once a court of appeals has entered such a judgment, that is the end of the case, and, like a verdict of acquittal by a jury, it is subject to no further review whatsoever, by rehearing, appeal or certiorari to this Court, or otherwise.

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[25] In a concurring opinion in *Sapir*, Mr. Justice Douglas expressed the view that to retry the defendant would violate his protection against double jeopardy. He went on to say, however (348 U.S. at 374): "If petitioner had asked for a new trial, different considerations would come into play, for then the defendant opens the whole record for such disposition as might be just. See *Bryan* v. *United States*, 338 U.S. 552. * * *"

[26] See Br. 31–36, arguing that the Court of Appeals had no jurisdiction to entertain the Government's petition for rehearing.

CONCLUSION

The judgment of the Court of Appeals is correct and should be affirmed.

Respectfully submitted,

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APPENDIX

18 U.S.C.:

SEC. 371. CONSPIRACY TO COMMIT OFFENSE OR TO DEFRAUD UNITED STATES

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

SEC. 1001. STATEMENTS OR ENTRIES GENERALLY

Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

Internal Revenue Code of 1939:

SEC. 145. PENALTIES.

* * * * *

(b) *Failure To Collect and Pay Over Tax, or Attempt to Defeat or Evade Tax.*—Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

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(26 U.S.C. 1952 ed., Sec. 145(b).)

SEC. 3748. PERIODS OF LIMITATION—(a) CRIMINAL PROSECUTIONS.

No person shall be prosecuted, tried, or punished, for any of the various offenses arising under the internal revenue laws of the United States unless the indictment is found or the information instituted within three years next after the commission of the offense, except that the period of limitation shall be six years—

* * * * *

(2) for the offense of willfully attempting in any manner to evade or defeat any tax or the payment thereof, and

* * * * *

For offenses arising under section 37 of the Criminal Code, March 4, 1909, 35 Stat. 1096, where the object of the conspiracy is to attempt in any manner to evade or defeat any tax or the payment thereof, the period of limitation shall also be six years. * * *

(26 U.S.C. 1952 ed., Sec. 3748(a)(2).)

28 U.S.C.:

SEC. 2106. DETERMINATION.

The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

Rules of the United States Court of Appeals for the Ninth Circuit:

Rule 23. *Rehearing.*—A petition for rehearing may be presented within 30 days after judgment. It must be printed, and briefly and distinctly state its grounds, and be supported by certificate of counsel that in his judgment it is well founded and that it is not interposed for delay. Twenty printed copies must be filed with the clerk of this court.

All petitions for rehearing, and motions for extensions of time to file them, shall be addressed to and be determined by the court as constituted in the original hearing.

Should a majority of the court as so constituted grant a rehearing and either from a suggestion of a party or upon its own motion be of the opinion that the case should be reheard en banc, they shall so inform the Chief Judge. The Chief Judge shall thereupon convene the active judges of the court and the court shall thereupon determine whether the case shall be reheard en banc.

Rule 26. *Mandate.*—In all cases finally determined in this court other than original proceedings, a mandate or other proper process in the nature of a procedendo shall, upon the payment of any costs due in the case, be issued, as of course from this court to the court below,

for the purpose of informing such court of the proceedings in this court, so that further proceedings may be had in such court as to law and justice may appertain. Such mandate, if not stayed by the order of a Circuit Judge who participated in such decision shall be issued on the expiration of 30 days from the date of such final determination, unless within said time a petition for rehearing be filed, in which case the mandate shall be stayed until 5 days after the determination of such petition.

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